

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADVANCED CARDIOVASCULAR
SYSTEMS, INC. and GUIDANT SALES
CORPORATION,

Plaintiffs,

v.

MEDTRONIC VASCULAR, INC. and
MEDTRONIC USA, INC.,

Defendants,

Civil Action No 98-80 (SLR)
(Consolidated with C A. No. 98-314
(SLR) and C A. No 98-316 (SLR))

**ACS'S MOTION FOR LEAVE TO FILE A SUR-REPLY BRIEF
TO RESPOND TO MEDTRONIC'S DISCUSSION OF
PHILLIPS V. AWH CORP. IN ITS POST-TRIAL REPLY BRIEFS**

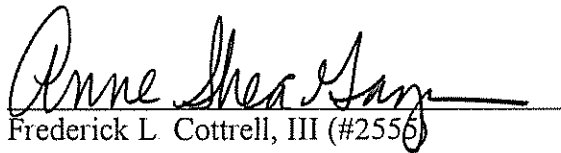
Plaintiffs Advanced Cardiovascular Systems, Inc and Guidant Sales Corporation (collectively “ACS”) respectfully request leave to file the attached sur-reply brief in response to Medtronic’s discussion of *Phillips v. AWH Corp.*, 2005 WL 1620331 (July 12, 2005) (en banc) in its post-trial reply briefs (D I. 678 and D.I. 679). (Exhibit 1 hereto)

On February 18, 2005, the jury in this case found that ACS's '154, '167, '168, and '133 patents were infringed and not invalid for obviousness. Medtronic filed opening briefs in support of its Renewed Motion for JMOL (D.I. 654) and Motion for New Trial (D.I. 653) on April 18, 2005. On June 17, 2005, ACS filed answering briefs in response to those motions (D.I. 673 and D.I. 674). Medtronic's reply briefs were originally due on July 11, 2005 (D.I. 659). At the request of Medtronic's counsel, however, ACS agreed to extend that due date until July 18, 2005, to accommodate the travel and holiday plans of Medtronic's counsel. (D.I. 676)

During that one-week extension, the Federal Circuit handed down its *en banc* decision in *Phillips*

Medtronic relies heavily on the *Phillips* decision in its reply briefs, citing it some twenty times in asking the Court to set aside the jury verdict or grant a new trial. As explained in the attached sur-reply, however, Medtronic's reliance on *Phillips* is misplaced, for *Phillips* fully supports the Court's decisions in this case.

In light of Medtronic's heavily reliance on *Phillips*, and because ACS did not have an opportunity to respond to Medtronic's *Phillips* arguments in its answering briefs, ACS respectfully requests that the Court grant ACS's motion for leave to file the attached sur-reply. A proposed Order is attached hereto as Exhibit 2.



Frederick L. Cottrell, III (#2556)

cottrell@rlf.com

Anne S. Gaza (#4093)

gaza@rlf.com

RICHARDS, LAYTON & FINGER

One Rodney Square

P.O. Box 551

Wilmington, DE 19899

(302) 651-7509

*Attorneys for Advanced Cardiovascular Systems,
Inc. and Guidant Sales Corporation*

OF COUNSEL:

J. Michael Jakes

Gerald F. Ivey

Michael A. Morin

FINNEGAN, HENDERSON, FARABOW

GARRETT & DUNNER, L.L.P.

1300 I Street, N.W., Suite 700

Washington, D.C. 20005

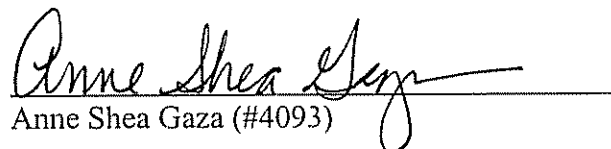
(202) 408-4000

(202) 408-4400

Dated: July 28, 2005

CERTIFICATION PURSUANT TO LOCAL RULE 7.1.1

The undersigned hereby certifies that counsel for plaintiffs, Advanced Cardiovascular Systems, Inc. and Guidant Sales Corporation (collectively "ACS"), has met and conferred with counsel for Medtronic Vascular, Inc. and Medtronic USA, Inc. ("Medtronic") and Medtronic opposes the foregoing Motion.


Anne Shea Gaza (#4093)

**UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

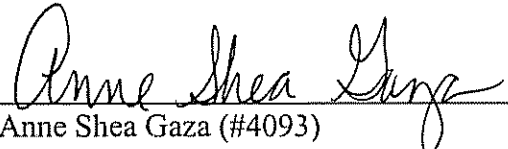
CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2005, I caused to be served by hand delivery the foregoing document and electronically filed the same with the Clerk of Court using CM/ECF which will send notification of such filing(s) to the following:

Karen Jacobs Loudon, Esquire
Morris, Nichols, Arsht & Tunnell
1201 N. Market Street
P.O. Box 1347
Wilmington, Delaware 19899-1347

I hereby certify that on July 28, 2005, I have sent by Federal Express the foregoing document to the following non-registered participants:

Raphael V. Lupo, Esquire
Donna M. Tanguay, Esquire
Mark G. Davis, Esquire
McDermott, Will & Emery
600 13th Street, N.W.
Washington, DC 20005


Anne Shea Gaza (#4093)
Richards, Layton & Finger, P.A.
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
(302) 651-7700
GAZA@rlf.com